No. 05-1432

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In the
Supreme Court of the United States

SERGIO LOEZA-DOMINGUEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondent's brief in opposition obscures the real questions presented by the petition for a writ of certiorari. The argument at pages 6 - 9 of Respondent's brief mischaracterizes the petition as though it were challenging the Attorney General's authority to promulgate the AWO regulation. It does not. Petitioner agrees that "agencies should be free to fashion their own rules of procedure", *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978), and for this reason he does not challenge the AWO regulation on its face. The Attorney General gets to say how the BIA will decide immigration appeals, and he is free to require three member panels, two member panels, or single member summary decisions. He could alter the BIA to screen appeals on a discretionary, certiorari-type basis. He might even abolish the BIA altogether. All of this is uncontroversial and beside the point.

The problem for courts is that the Attorney General has adopted procedures that authorize secret BIA decisions. *See Albathani v. I.N.S.*, 318 F.3d 365, 377 (1st Cir. 2003) ("Because the summary affirmance is only of the 'result' and not the reasoning, this means courts of appeals are forced to review a decision which may or may not contain the reasoning of the BIA. The court thus reviews the BIA decision without knowing its basis."). At pages 12 - 13 of his brief, Respondent once again concedes that in "jurisdictional conundrum" cases like *Zhu v. Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud v. Ashcroft*, 350 F.3d 201, 205-206 (1st Cir. 2003), the BIA's undisclosed AWO decision is (1) a distinct agency decision, (2) that may be substantively different from the IJ's opinion, and (3) whose undisclosed reasoning is of independent legal consequence for the reviewing court to the extent that it differs from the reasoning of the IJ opinion in ways that could impact jurisdiction. In other words, for this category of cases, the

"affirmed" IJ opinion is not reliably "the final agency determination" for purposes of judicial review, even though the boilerplate language of the AWO says it is. Remand is necessary to clarify the actual basis of the BIA's undisclosed decision.

Respondent ignores the logical implications of his position when he insists that the secrecy of the AWO process only necessitates remand in this narrow category of jurisdictional conundrum cases. If, as Respondent agrees, differences between the BIA's secret AWO decision and the disclosed IJ opinion it purports to affirm do matter when those differences could alter the reviewing court's understanding of its jurisdiction (thus requiring remand to the BIA for clarification of its undisclosed reasoning), how can it be that all other kinds of substantive differences between a secret AWO decision and the disclosed IJ opinion it purports to affirm do not matter to the reviewing court for purposes of the remand rule of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *INS v. Ventura*, 537 U.S. 12 (2002); and *Thomas v. Gonzales*, 126 S.Ct 1613 (2006)? If the BIA renders a secret decision in each AWO case, and the reasoning of that secret decision may be substantially different from the reasoning of the IJ opinion whose bare result is "affirmed", why wouldn't the remand rule be triggered? Respondent dodges the question.

Chenery's bedrock principle of administrative law is that a reviewing court may not affirm an agency decision on a basis the agency itself did not adopt, *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)(*Chenery I*), and "it will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)(*Chenery II*). Respondent argues for selective application of this rule: on the one hand, it is unacceptable for a court to guess about the basis of an AWO order where the

BIA's secrecy obscures its reasoning on issues that could impact jurisdiction, and there remand is necessary, but otherwise courts should be free to guess away, as happened here.

Here, the IJ ordered Mr. Loeza-Dominguez removed on alternative grounds. The IJ held that his conviction was both a "crime of child abuse" and "a crime involving moral turpitude." It is entirely plausible that the BIA affirmed the IJ only with respect to her determination that the conviction was a crime of moral turpitude.[1] Given *Chenery, Ventura,*

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[1] This is just one plausible example of what the BIA may well have done in the instant case when it issued the AWO order and affirmed the bare "result" of the IJ opinion:

> **The Board affirms the results of the decision below.** We will dismiss the alien's appeal and affirm the immigration judge's determination that his state conviction for "malicious punishment of a child" is a crime involving moral turpitude. See *Matter of Tran*, 21 I&N Dec. 291, 293 (BIA 1996)("The essence of moral turpitude is an evil or malicious intent."). The alien also argues that the immigration judge erred when she found his conviction constitutes a "crime of child abuse" within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i). The Board has not yet directly addressed the scope of this provision, and as the immigration judge did not provide significant analysis of the statute we do not and need not adopt this aspect of her decision. While the alien's arguments may have merit, we need not resolve that issue here. Even assuming the immigration judge erred in this aspect of her decision, any such error would be harmless because we affirm and adopt her alternative determination on the moral turpitude charge. **The decision below is, therefore, the final agency determination.**

and *Thomas*, this presents a conundrum no less problematic than the type acknowledged by Respondent, it just happens to concern potential substantive differences between the secret BIA decision and the disclosed IJ opinion that would not obviously affect circuit court jurisdiction. *Ventura* and *Thomas* both enforced the remand rule with respect to questions of substantive immigration law that did not impact federal court jurisdiction.

Respondent, at pages 14 - 15 of his brief, tries to gloss over the Eighth Circuit's quintessential *Chenery* violation, fantasizing that the court of appeals really believed it was just applying the BIA's own holding about the "crime of child abuse" removal statute. In reality, the *Chenery* violation was compounded. Not only did the Eighth Circuit decide an important question of immigration law in the first instance and in the absence of the Attorney General's position on the statute, the court did so by adopting the *post hoc* argument of government counsel. The government counsel acknowledged his argument was drawn from dicta in the BIA case, *Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999), a case that (1) was never cited by any party to the administrative proceedings below, (2) was never mentioned by the IJ or BIA, and (c) addressed the scope of a completely separate provision of the removal statute.

Contrary to Respondent's assertions, the Eighth Circuit well understood that it had no meaningful agency answer to the question of whether Mr. Loeza-Dominguez's conviction constitutes a "crime of child abuse." But the court also understood that remanding the case for that agency answer would concede Mr. Loeza-Dominguez's point that the BIA had misapplied the AWO regulation to his case -- a matter that *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004), insists is wholly committed to agency discretion beyond

review. The obvious tension between *Chenery's* remand rule and *Ngure's* controversial holding is what drove the Eight Circuit to seize upon the government's *post hoc* argument and alchemize BIA dicta into the needed agency answer.

Respondent claims there is no conflict between the Eighth Circuit's decision here and the Third Circuit's decision in *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004). Brief in Opposition at pages 13 - 15. The conflict could not be clearer. This case is a gem because it so vividly confirms the Third Circuit's prediction that *Ngure* would inevitably lead the Eighth Circuit to usurp the BIA's functions and build "case law that is fashioned without the benefit of agency expertise." *Smriko*, 387 F.3d at 297. This case demonstrates that the circuit conflict is intractable. The First, Third, Fifth, and Ninth circuits will correct BIA misapplication of the AWO regulation and remand to the BIA, while the Second, Eighth, and Tenth Circuits, based on their distorted reading of 5 U.S.C. § 701(a), will not.[2]

The petition for a writ of certiorari should also be granted because this case illustrates that the IJ opinion is not actually "the final agency determination" for purposes of judicial review in a much broader set of circumstances than the courts of appeals have thus far recognized. Circuit court review of "affirmed" IJ opinions in AWO cases is inconsistent with *Chenery, Ventura,* and *Thomas*, and so problematic that it

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[2] *Compare Haoud*, 350 F.3d 201, 205-06 (1st Cir. 2003); *Smriko*, 387 F.3d 279, 290-95 (3d Cir. 2004); *Zhu*, 382 F.3d 521, 527(5th Cir. 2004); and *Lanza v. Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004), *with Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006); *Ngure*, 367 F.3d 975, 983 (8th Cir. 2004); *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004).

warrants from this Court's precedents that it warrants the immediate intervention of this Court and summary reversal.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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